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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 288

THOMAS BASS, ... Petitioner

vs.

COMMONWEALTH OF KENTUCKY, . Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

ZEB. A. STEWART,
Corbin, Kentucky,
Counsel for Petitioner.

The undersigned counsel for Petitioner, hereby certifies that he has delivered a copy of the within petition for writ of certiorari to Honorable Eldon S. Dummitt, Attorney General of the Commonwealth of Kentucky, at Frankfort, Kentucky, this 22nd day of July, 1944.

ZEB. A. STEWART.

Roberts Printing Co., Frankfort, Ky.

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STATUTES CITED AND AUTHORITIES

Kentucky Revised Statutes, Section 422.110 (Carroll's Statutes, Section 1649-b-1-b-3) Section 237 B as amended by Act of 1925, 43 Statute, 937, Title 28, Section 344-B U. S. Judicial Code; Ashcraft vs. State of Tennessee, Advance Sheet U. S. Supreme Court Reporter, issue of May 15, 1944, No. 391, P. 921; Lyons vs. State of Okla., Advance Sup. Ct. Rep. issue of July 1, 1944, Vol. 64, No. 16, P. 1208; McNabb, et al. vs. U. S., Advance Sup. Ct. Rep., issue of March 15, 1943, 318 U. S. P. 608; Brown vs. Miss., 309 U. S. 103; Chambers vs. State of Florida, 309 U. S. 227; Hysler vs. Florida, 62 U. S. Sup. Ct. Rep.

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688; Pyle vs. State of Kansas, et al., No. 50, 63 Sup Ct. Rep.; Mooney vs. Holohan, 294 U. S. 103; Anderson vs. U. S. 63 Sup. Ct. Rep. Advance, issue of March 15, 1943, and cases cited in Ashcraft, McNabb, and Anderson opinions, supra, Section 50, Kentucky Criminal Code of Proceedure; Bennett vs. Com. of Ky., 226 Ky. 529; Com. vs. McClanahan, 153 Ky. 412; Lett vs. Com., 284 Ky. 267; Butler vs. Com., 284 Ky. 276; McIntosh vs. Com., 257 Ky. 465 (quoted from).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

THOMAS BASS - - - - - - - - - *Petitioner*

vs.

COMMONWEATH OF KENTUCKY - - - *Respondent*

PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Your petitioner, Thomas Bass, respectfully shows:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner, Thomas Bass, is an uneducated young negro, a native of South Carolina, and at the time of his arrest, June 17, 1942, and his indictment on July 1, 1942, was a soldier in the army of the United States,

and a member of the Medical Detachment stationed at Bowman Field near Louisville, Kentucky. Petitioner is now confined in a death cell in the State Penitentiary at Eddyville, Kentucky, under a sentence of death pronounced by the Criminal Division of the Circuit Court of Jefferson County, Kentucky, upon an indictment, trial and conviction for the alleged murder of one John Brown, also a man of color, which alleged crime is alleged to have been committed about 5:30 P. M. June 17, 1942, in the city of Louisville, Kentucky. Upon the return of the verdict of the jury and before judgment had been entered thereon, petitioner by his then counsel filed motion and grounds for new trial wherein it was urged (A) that the verdict was flagrantly against the law and the evidence (B) improper, and prejudicial argument of the attorney for the Commonwealth in his final argument of the case to the jury. Motion and grounds for new trial having been overruled and exceptions saved, petitioner in due time prosecuted an appeal to the Court of Appeals of Kentucky, the court of last resort in the Commonwealth, which court on January 21, 1944, affirmed the judgment of the trial court, which opinion is published in 177 Southwestern, Second Series, at Page 386, 296 Ky. 426. A copy of said opinion is attached hereto and made a part of this petition marked "A." Petition for rehearing of said cause was duly filed and overruled on April 25, 1944, without expression of opinion of the Federal questions and other questions presented in the petition for rehearing. A printed copy of petition for rehearing is filed herewith. The Court of Appeals on May 23, 1944, granted a stay of execution of sentence pending the outcome of this proceeding in this court (Volume 1, P. 38, typewritten transcript of record herein). A complete typewritten

transcript of the record of the case in the Court of Appeals including briefs, duly certified by the clerk of that court has been filed in the office of the clerk of the Supreme Court. Petitioner, as shown by his briefs and argument on appeal to the Court of Appeals (which are copied into the record on file herein) seasonably and properly raised and presented in argument and briefs the Federal questions relied upon in the present proceeding in this court wherein petitioner contends:

That he has been denied due process and equal protection of the law guaranteed him as a citizen of the United States, by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and by Sections Seven and Eleven of the Constitution of the Commonwealth of Kentucky, and especially in that your petitioner at his trial was compelled to give evidence against himself by reason of the trial court admitting as evidence before the jury an alleged written confession of the crime charged, which alleged confession was procured from petitioner while in custody of some five or six policemen and detectives of the city of Louisville, by "sweating," assaults, intimidation, putting in fear, "plying with questions" and threats of death, which methods of obtaining evidence is prohibited, denounced and condemned by Section 422.110 Kentucky Revised Statutes (Section 1649-b-1 to b-3 Carroll's Kentucky Statutes) Act of Kentucky General Assembly of 1912, as amended by Act of 1942, which statute is entitled, viz: "Confession obtained by 'sweating' not admissible."

This statute (422.110) reads as follows:

(1) "No peace officer, or other person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions, or extort information to be used against him on his trial by threats or other wrongful means, nor shall the person having custody of the accused permit any other person to do so."

(2) "A confession obtained by methods prohibited by section (1) is not admissible as evidence of guilt in any court."

Section 422.990 Kentucky Revised Statutes (Carroll's Statutes, Section 1649-b-4) provides:

"Any person who violates KRS 422.110 shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned for not less than ten nor more than sixty days, or both."

The testimony of the police officers and detectives who "worked the case up" (Pages 11 to 24, 36 to 42, Volume Two (2) typewritten transcript of Evidence, and the alleged "confession" itself (Tr. Ev. 43-45) admit that petitioner while in their custody was not taken before any "committing magistrate," but that he was taken by them from jail to Police Headquarters on June 18, 1944, and there grilled, "plied with questions" and by assaults, threats of death and Third Degree methods, and in violation of this penal statute forced to sign the alleged confession admitted in evidence by the trial court. The evidence also shows that defendant was not afforded the opportunity of counsel nor was he warned that any thing he might say would

be used in evidence against him at his trial. Petitioner testified in his own behalf at his trial in part as follows (Volume 1 typewritten transcript of Evidence, P. 27):

> "When they (policemen and detectives) got me over there (Police Headquarters) the fellows —two or three 'laws' over there—drawed a black jack on me and pistol and said they were going to kill me if I didn't say I was going to rob the man * * * they said they were going to kill me if I didn't say I hit him to rob him. They said 'if you hit the man you robbed him, didn't you rob him' and drawed back and hit me with a black jack, and said 'you must say you robbed him.'"

It was petitioner's theory of the case and he so testified, that the deceased, Brown, invited him into his room and brought on the difficulty, reached for a pistol on the bed, and petitioner in his own necessary self-defense struck deceased with a hammer to repel the assault, and from which wound inflicted in self-defense, death ensued. Petitioner further contends that he was denied the right of trial by jury in violation of the Sixth Amendment to the Federal Constitution of the vital question of fact in issue under his plea of not guilty as to whether the alleged confession was or was not, voluntary or involuntary, in other words, was the alleged confession obtained in violation of the "Anti-Sweating Act?" The trial court admitted the alleged confession in evidence but failed to instruct the jury for its determination whether it was voluntary or involuntary, so that with its admission in evidence with no admonition or instruction from the court, the defendant with the alleged confession before it, stood admittedly guilty notwithstanding his own evidence on

the stand that he was forced by threats of death and assaults to admit guilt.

JURISDICTION

The jurisdiction of this court rests upon Section 237-B of the Judicial Code, as amended by Act of 1925, 43 Statute, 937 (U.S.C. Title 28, Section 344-B). Petitioner contends that the judgment sought to be reviewed was final, and necessarily decided adversely to petitioner substantial Federal questions which were properly presented by the record in briefs and argument on appeal and for rehearing, and petitioner has exhausted his remedy in the courts of Kentucky. Petitioner contends that he has been denied the equal protection and due process of law guaranteed by the 5th, 6th and 14th Amendments to the Constitution of the United States, and in plain and open disregard of "those fundamental principles of liberty and justice" guaranteed by the Federal Constitution as well as by Section Eleven (11) of the Constitution of the Commonwealth of Kentucky, and the Statutes aforesaid. The following cases among others, sustain the jurisdiction of this court, viz:

> Ashcraft et al. vs. State of Tennessee, Advance Sheet Supreme Court Reporter, issue of May 15, 1944, decided May 1, 1944, wherein it is held that the question of the voluntariness or involuntariness of an alleged confession was a question of fact for the jury, as also held in the recent case of Lyons vs. State of Oklahoma, decided June 5, 1944, reported in Advance Sheet of Supreme Court Reporter, issue of July 1, 1944, Vol. 64, No. 16; McNabb et al. vs. United States, Advance Sheet Supreme Court Reporter, Vol. 63, No. 9, Page 608, issue of March 15, 1943, 318 U. S. 608.

and cases cited in McNabb opinion; Brown vs. Mississippi, 297 U. S. 278; Chambers vs. State of Florida, 309 U. S. 227; Hysler vs. Florida, 62 U. S. 688; Pyle vs. State of Kansas et al. No. 50, 63 Sup. Ct.; Mooney vs. Holohan, 294 U. S. 103; Anderson vs. United States, 63 Sup. Ct. Advance, issue of March 15, 1943, and cases cited in McNabb and Anderson opinions.

Even in all previous cases adjudicated by the Court of Appeals of Kentucky, wherein the voluntariness or the contrary of similar alleged confessions have been admitted in evidence and refuted by a defendant at his trial, the Court of Appeals has consistently held until the opinion in the instant case, that the question of the voluntariness or the contrary of an alleged confession out of court was a question solely of fact to be determined by the jury under proper instructions of the trial court. Among such holdings are the following cases, viz: Bennett vs. Commonwealth, 226 Ky. 529, 11 S. W. (2) 437; Commonwealth vs. McClanahan, 153 Ky. 412, 155 S. W. 1131; Lett vs. Commonwealth, 284 Ky. 267, 144 S. W. (2) 505; Butler vs. Commonwealth, 284 Ky. 276, 144 S. W. (2) 510; McIntosh vs. Commonwealth, 257 Ky. 465, 76 S. W. (2) 320. In the McIntosh case, supra, the Court of Appeals wrote in its opinion, viz:

> "The rule in this jurisdiction is that, when there is a conflict of evidence as to whether the confession was voluntarily made, or obtained by threat, intimidation or in any manner by duress, the question of fact should be submitted to the jury, leaving to their consideration the conflicting evidence and its effect in case of belief or disbelief" (citing many of the foregoing cases). Continuing the McIntosh opinion:

> "Accordingly the court erred in eliminating the testimony from the consideration of the jury under an appropriate instruction."

The failure of the trial court to submit for the jury's determination this vital fact question was not only violative of the Sixth Amendment to the Federal Constitution, and Section 11, Bill of Rights of the Kentucky Constitution, but was in total disregard of Section 180 of the Kentucky Code of Criminal Proceedure, which provides as follows:

> "Issues of law shall be tried by the court. Issues of fact, in prosecution for offenses of which the punishment is limited to a fine of sixteen dollars, shall be tried by the court. *All other issues of fact shall be tried by a jury.*"

In Kentucky, the rule is in criminal cases that it is the duty of the court whether so requested or not, to instruct the jury as to all the law of the case where there is any evidence bearing upon the issues. Had the trial court in the instant case have submitted this issue of fact to the jury it may have concluded from the evidence, and assuredly would have, the alleged confession was coerced, and procured in violation of the Anti-Sweating Act. As the case was tried this purely fact question was left to the arbitrary determination of the trial court. Due process as defined by the Kentucky Code of Criminal Proceedure, Section 50 was disregarded by the police officers in taking the defendant to police headquarters for inquisition and grilling, rather than before a committing magistrate of the city of Louisville or Jefferson county. The above section of the Code provides, viz:

> "When a person who has been arrested shall be brought, or, in pursuance of a bail bond, shall come, before a magistrate of the county in which the offense is charged to have been committed, the charge shall forthwith be examined."

Section 51 of the Kentucky Criminal Code, following Section 50 supra, regulating criminal proceedure, provides as follows:

> "The magistrate, before commencing the examination, shall state the charge, and inquire of the defendant whether he desires the aid of counsel, and shall allow a reasonable opportunity for procuring it."

No pretense was made by the police officers and detectives of the city of Louisville to observe the provisions of the Code of Criminal proceedure, although there were divers committing magistrates of the city and county of Jefferson having jurisdiction of the offense charged, and so far as this record discloses no commitment was ever made until the indictment by the grand jury on July 2, 1942, the police officers being content to conduct an inquisition of the defendant in order to "work up the case" to use the language of one of the police officers who testified at the trial. Although these officers testified that the alleged confession was voluntary, it does not appear anywhere in the evidence that this untutored negro boy who had formerly been confined in an insane asylum according to his evidence (Typewritten Tr. of Ev., P. 32) was warned by any of these officers that any thing he might say by way of culpability would be used against him at his trial, as was their duty to tell him. Nor was he advised that he was entitled to counsel nor given an op-

portunity to secure counsel. The alleged confession in question will be found at Pages 43-45 of Volume Two (2) typewritten transcript of record. A mere reading thereof, and an understanding of the way, manner, and circumstances of its obtention will be sufficient to convince any intelligent mind with any sort of knowledge of police and "Third Degree" methods that the same was obtained by methods condemned by the Statutes of the United States, the Commonwealth of Kentucky, and the courts of all civilized countries.

CONCLUSION

In view of the foregoing and this record, it is submitted that the writ of certiorari to the Court of Appeals of Kentucky should be granted, its judgment reversed and remanded to the said court there to be proceeded with according to law.

Respectfully submitted,

ZEB. A. STEWART,
Counsel for Petitioner.

July, 1944.